

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

JOHN E. MOSS, ET AL., )  
 )  
 Plaintiffs, )  
 )  
 v. ) Civil Action No. 1254-71  
 )  
 MELVIN R. LAIRD, )  
 )  
 Defendant )

PAUL FISHER, )  
 )  
 Plaintiff, )  
 )  
 v. ) Civil Action No. 1865-71  
 )  
 DEPARTMENT OF DEFENSE, ET AL., )  
 )  
 Defendants. )

MEMORANDUM AND ORDER

Two Congressmen and the Director of the Freedom of Information Center have brought this action against the Department of Defense and the Secretary seeking access to portions of the Pentagon Papers under the Freedom of Information Act, 5 U.S.C. § 552. Defendants move to dismiss and for summary judgment. The issues were fully briefed and argued.

The great bulk of the Pentagon Papers has been officially made public. At issue here is approximately two percent of the text of the first 43 volumes,<sup>\*/</sup> and the entire last four volumes of this 47-volume study. This material is being withheld from public scrutiny because it has been classified Top Secret or Secret under Executive Order 10501.

The classification decision followed a full review of the Pentagon Papers after they became the subject of press comment earlier this year. J. Fred Buzhardt, General Counsel of the Department of Defense, acted as the declassifying officer with the aid of a task force. His conclusions as to the

<sup>\*/</sup> Certain footnotes in these volumes are still under review but this process is being expedited and should be completed by January 1, 1972.

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sensitivity of the documentary material withheld were affirmed by the Deputy Secretary of Defense and by the Secretary himself.

It was indicated by sworn affidavit that the deletions made in the 43 volumes fall into one or more of the following four categories:

(1) Information concerning the United States military plans, principally those of the Joint Chiefs of Staff, the Pacific Command, and the Military Assistance Command, Vietnam, as well as other U.S. planning, the public disclosure of which could cause serious damage to the defense interests of the United States. The plans give exact knowledge to military planners of hostile countries as to what the United States will or will not do in response to actions taken against either the United States or countries friendly to it, such as Thailand.

(2) Information concerning joint planning of defense arrangements by the United States with other countries, principally SEATO members, and bilateral defense arrangements between these countries not involving the United States, the public disclosure of which directly affects the defense interests of United States allies.

(3) Information concerning United States diplomatic negotiations with high-level officials of other countries, notably South Vietnam and Laos, the public disclosure of which could do damage to the foreign relations of the United States by revealing United States assessment of Southeast Asian government leaders -- outlining their attitudes to the USSR, SEATO, and the United States, and reflecting, in turn, the degree of United States trust in them.

(4) Information derived from United States intelligence, or descriptive of United States intelligence activities, the public disclosure of which could damage the defense interests of the United States. Upon learning of these United States intelligence operations and discovering thereby the sophisticated level (for example, in electronic applications) the United States has reached in collecting intelligence, hostile countries could better undertake measures to prevent United States intelligence collection.

As to volumes 44 to 47, inclusive, the affidavit indicates that these deal exclusively with sensitive negotiations involving North Vietnam and employing the good offices of other governments in seeking peace and the release of prisoners of war; that much of the material contained in the four volumes could, if disclosed, result in serious damage to the nation by jeopardizing the internal relations of the United States; and that other documents in these volumes, if made publicly available, could cause the compromise of intelligence operations vital to the national defense and thereby cause exceptionally grave damage to the nation.

The Freedom of Information Act exempts from public inspection matters "specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy," (5 U.S.C. 552(b)(1)). It was conceded at oral argument that the Government's claim to this exemption in this instance is made in good faith. There is nothing even to suggest that the administrative decision is arbitrary or capricious. To the contrary, the decision was made at the highest level of the Department of Defense after careful consideration.

Plaintiffs nonetheless urge that this Court personally review, in camera, the withheld documents and make its own independent de novo determination. Under the circumstances here presented, no such in camera inspection is necessary. Soucie v. David, No. 24,573 (D.C. Cir. April 13, 1971); Epstein v. Resor, 421 F.2d 930 (9th Cir. 1970). Nor would such an inspection be desirable. It is entirely foreign to our traditions to place papers in the hands of a judge for his private ex parte inspection, excluding them from the eyes of the litigants. This is a course that should be followed only under the most compelling necessity and this is not such a case. The determination of the interests of national defense or foreign policy cannot be made by applying some simple litmus test to a document presented, particularly in a case such as this where good faith is not in issue. The Court, with no experience or background in such matters, would require detailed ex parte background briefing even to make a tentative judgment and thus the litigation would proceed in secret with those seeking the data wholly excluded.

The Freedom of Information Act was not designed to open all Government files indiscriminately to public inspection. Obviously documents involving such matters as military plans and foreign negotiations are peculiarly the type of documents entitled to confidentiality. The orderly processes of government and

indeed the stability of the country itself so require. Congress recognized this in the Act and the Constitution has no requirement to the contrary. The public's right to be informed cannot be transposed into a legal requirement that all governmental papers will be automatically revealed. Government, like individuals must have some degree of privacy or it will be stifled in its legitimate pursuits. There is no basis here for upsetting the responsible decision made as to these particular papers. Defendants have made an adequate showing that disclosure would be harmful to the national defense or foreign policy. There is no need for an in camera review.

Defendants' motion for summary judgment is granted.

So ordered.

(Signed) GERHARD A. CEBELLE

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UNITED STATES DISTRICT JUDGE

December 7, 1971.

TRANSMITTAL SLIP		DATE 17 December 1971
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ROOM NO. 6F19	BUILDING Hqs.	
REMARKS:  Of possible interest to you.  <div style="display: flex; align-items: center;"><div style="text-align: right;"><del>JPM</del> <del>POO</del> <del>DOX</del> → keep w/ Pentagon papers</div><div style="border: 1px solid black; width: 100px; height: 15px; margin-left: 20px;"></div></div>		
FROM: Assistant General Counsel		
ROOM NO. 7D07	BUILDING Hqs.	EXTENSION <div style="border: 1px solid black; width: 50px; height: 15px;"></div>

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REPLACES FORM 36-8  
WHICH MAY BE USED.

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